

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JASON SCHMIDT,

Plaintiff,

V.

CITY OF SEATTLE (SPD), et al.,

Defendants.

C08-105Z

ORDER

THIS MATTER comes before the Court on defendants' motion for partial summary judgment, plaintiff's cross-motion for partial summary judgment, and defendants' motion to strike plaintiff's untimely response and cross-motion. Having reviewed all papers filed in support of and in opposition to the various motions, the Court does hereby order as follows:

- (1) Defendants' motion to strike, docket no. 29, plaintiff's untimely response and cross-motion is DENIED;
- (2) Defendants' motion for partial summary judgment, docket no. 19, is GRANTED;
- (3) Plaintiff's cross-motion for partial summary judgment, docket no. 27, is DENIED;
- (4) Plaintiff's state law claims are DISMISSED;

ORDER 1-

1 (5) Individual defendants Donnie Lowe, Kathryn Hernan, and Richard Zurcher are
2 entitled to qualified immunity, and all of plaintiff's claims against these
3 individual defendants are DISMISSED with prejudice;

4 (6) Plaintiff is directed to SHOW CAUSE by November 21, 2008, why the matters
5 in defendants' requests for admissions should not be deemed admitted for
6 failure to serve timely written answers or objections; and

7 (7) Plaintiff is directed to SHOW CAUSE by November 21, 2008, why the
8 remaining claims in this case should not be dismissed in light of this Order.

9 **Background**

10 Plaintiff Jason Schmidt asserts claims against the City of Seattle, Seattle Police Chief
11 Gil Kerlikowske, Seattle Police Lieutenant Donnie Lowe, Seattle Police Detective Kathryn
12 Hernan, and Seattle Police Officer Richard Zurcher in connection with plaintiff's arrest on
13 Fourth Avenue while a rally organized by Act Now to Stop War and End Racism
14 (A.N.S.W.E.R.) was taking place at Westlake Park. A.N.S.W.E.R. applied for and was
15 granted a Special Event Permit to conduct a "Stop the War on Iraq" rally in Westlake Park on
16 Saturday, September 24, 2005. Exhs. 2 & 3 to Carr Decl. (docket no. 20). The Special
17 Event Permit authorized the event to begin at 9:00 a.m., and mandated that it end by 5:00
18 p.m. Exh. 3 to Carr Decl. The Special Event Permit required A.N.S.W.E.R. to comply with
19 the instructions in the attached Seattle Police Department Parade Permit. *Id.* The Parade
20 Permit allowed A.N.S.W.E.R. to conduct a march along a designated route, beginning and
21 ending at Westlake Park, traveling southbound on Second Avenue to Marion Street and
22 northbound on Fourth Avenue to Pine Street, with no stops along the way. Exh. 4 to Carr
23 Decl. The march was expected to commence at 1:15 p.m.; the time of anticipated conclusion
24 for the march was not expressly stated in the Parade Permit. *Id.*

25 On September 24, 2005, Officer Richard Zurcher was assigned, as part of a Seattle
26 Police Department ("SPD") bicycle squad, to patrol the A.N.S.W.E.R. event area. Zurcher

1 Decl. at ¶ 1 (docket no. 22). By about 2:38 p.m., the march had ended and the participants
2 had proceeded to Westlake Park or otherwise dispersed. *Id.* at ¶ 4; Lowe Decl. at ¶ 5 (docket
3 no. 23). At roughly 2:45 p.m., Officer Zurcher observed plaintiff meandering down one of
4 the west lanes of Fourth Avenue. Zurcher Decl. at ¶ 4; Lowe Decl. at ¶ 5. Westlake Park is
5 on the east side of Fourth Avenue, and plaintiff did not appear to be heading in the direction
6 of the A.N.S.W.E.R. rally. Zurcher Decl. at ¶ 4. Plaintiff was not near the participants of
7 the march, and he did not have any obvious impairment that might have inhibited his ability
8 to keep up with the march. *Id.*; Lowe Decl. at ¶ 5.

9 According to both Officer Zurcher and Lieutenant Donnie Lowe, who commanded
10 four bicycle squads deployed on September 24, 2005, to escort the A.N.S.W.E.R. march and
11 patrol the rally area, Lowe Decl. at ¶ 1, at the time plaintiff was in the street, northbound
12 vehicle traffic on Fourth Avenue was backed up for blocks. Zurcher Decl. at ¶ 5; Lowe
13 Decl. at ¶ 5. In contrast, plaintiff has averred “[a]t no point did I see any large traffic jams
14 caused by the protest,” and “I did not see any traffic because the police had blocked traffic
15 well away, at least two blocks away, from the march’s end point.” Schmidt Decl. at ¶¶ 12
16 & 15 (docket nos. 27-2 & 27-3).

17 Because plaintiff’s presence prevented the reopening of Fourth Avenue to vehicle
18 traffic, Officer Zurcher approached plaintiff and asked him to “get out of the street.”
19 Zurcher Decl. at ¶¶ 5-7; *see also* Lowe Decl. at ¶ 7. After observing Officer Zurcher’s
20 unsuccessful attempts to persuade plaintiff to exit the street, Lieutenant Lowe approached,
21 and repeatedly ordered plaintiff to get out of the street. Lowe Decl. at ¶¶ 6 & 10. At the
22 time, Lieutenant Lowe was of the opinion that plaintiff could proceed on the adjacent
23 sidewalk, which was a public forum equivalent to the street, and that asking plaintiff to move
24 to the sidewalk would not negatively impact plaintiff’s right of free speech. *Id.* at ¶ 7.
25 Plaintiff manifested no intent to comply with the requests or directions of Officer Zurcher
26 and Lieutenant Lowe. Zurcher Decl. at ¶ 9; Lowe Decl. at ¶ 10. Finally, Lieutenant Lowe

1 asked plaintiff “whether there was anything [he] could say or do that would convince
2 [plaintiff] to leave the street.” Lowe Decl. at ¶ 10; *see also* Zurcher Decl. at ¶ 9. Upon
3 plaintiff’s negative response, which plaintiff indicates was, “you can tell me what law I’m
4 breaking,” Schmidt Decl. at ¶ 24, Lieutenant Lowe instructed Officer Zurcher to arrest
5 plaintiff. Lowe Decl. at ¶ 10; *see* Zurcher Decl. at ¶ 10.

6 Lieutenant Lowe had no physical contact with plaintiff. Lowe Decl. at ¶ 11. Officer
7 Zurcher engaged only in the physical contact necessary to place plaintiff in handcuffs.
8 Zurcher Decl. at ¶ 11. According to both Officer Zurcher and Lieutenant Lowe, plaintiff
9 never complained about the handcuffs or indicated that he was in any pain. Zurcher Decl. at
10 ¶ 11; Lowe Decl. at ¶ 11. Plaintiff does not dispute that no force was used against him and
11 that he did not bring any issues concerning the handcuffs to Officer Zurcher’s or Lieutenant
12 Lowe’s attention; he merely accuses the officer of making “the handcuffs so tight that the
13 marks stayed on my wrists for several hours after they were removed.” Schmidt Decl. at
14 ¶ 36.

15 Plaintiff was transported to the West Precinct, where Detective Kathryn Hernan was
16 assigned on September 24, 2005, to process paperwork relating to any arrest made during the
17 A.N.S.W.E.R. event. Hernan Decl. at ¶ 1 (docket no. 21). In preparing an Incident Report,
18 Detective Hernan relied solely on a Booking Data Card completed by Officer Zurcher under
19 penalty of perjury. *Id.* at ¶ 6; *see also* Exh. 1 to Hernan Decl. Detective Hernan was not
20 involved in plaintiff’s arrest, and she does not recall having any contact with plaintiff on
21 September 24, 2005. Hernan Decl. at ¶¶ 5 & 7.

22 Over two years later, on January 23, 2008, plaintiff filed this action, captioning his
23 complaint as alleging “violations of civil rights, false arrest, false imprisonment, malicious
24 prosecution, battery, assault, intentional infliction of emotional distress, [and] negligence.”
25 Complaint at 1 (docket no. 1). The body of the complaint contains two counts alleging
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1 violation of civil rights pursuant to 42 U.S.C. § 1983: one brought against all individual
2 defendants, and one naming the City of Seattle, Chief Kerlikowske, and Does 1-100.

3 On September 11, 2008, defendants filed a motion for partial summary judgment,
4 noting it for October 3, 2008. At plaintiff's counsel's request, defendants renoted their
5 motion to October 10, 2008. See Carr Supp. Decl. at ¶ 2 (docket no. 26). Thus, plaintiff's
6 response to defendants' motion was due on October 6, 2008. Local Rule CR 7(d)(3).
7 Plaintiff did not file a response until 10:52 p.m. on October 10, 2008, over twelve hours after
8 defendants had filed a reply asking the Court to treat their motion as unopposed. See Reply
9 at 2 (docket no. 25) (citing Local Rule CR 7(b)(2) ("If a party fails to file papers in
10 opposition to a motion, such failure may be considered by the court as an admission that the
11 motion has merit.")). Plaintiff combined with his response to defendants' motion a cross-
12 motion for partial summary judgment, but plaintiff did not denominate his document in
13 CM/ECF as a motion and he did not assign a noting date to his cross-motion. In addition,
14 plaintiff did not request an extension or provide any explanation for the untimeliness of his
15 response. In a supplemental reply, filed on the following weekday, Monday, October 13,
16 2008, which was a holiday, defendants moved to strike plaintiff's untimely response and
17 cross-motion, suggesting that plaintiff could file a separate motion for partial summary
18 judgment at a later date to the extent that the issues were not decided upon defendants'
19 motion. See Supp. Reply at 2 (docket no. 29).

20 **Discussion**

21 **A. Motion to Strike**

22 Plaintiff's counsel has offered no excuse for the late filing of his response brief. The
23 untimeliness of his brief prevented defendants from submitting a reply addressing the merits
24 of plaintiff's response. Because plaintiff's arguments are unavailing, however, striking the
25 response brief and/or allowing plaintiff to submit another cross-motion sometime before the
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1 dispositive motions deadline, which is currently January 6, 2009, does not promote judicial
2 economy. The Court therefore denies the motion to strike.¹

3 **B. Summary Judgment Standard**

4 The Court should grant summary judgment if no genuine issue of material fact exists
5 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The
6 moving party bears the initial burden of demonstrating the absence of a genuine issue of
7 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it
8 might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In support of its motion for summary judgment, the moving
9 party need not negate the opponent's claim, *Celotex*, 477 U.S. at 323; rather, the moving
10 party will be entitled to judgment if the evidence is not sufficient for a jury to return a verdict
11 in favor of the opponent, *Anderson*, 477 U.S. at 249.

12 When a properly supported motion for summary judgment has been presented, the
13 adverse party "may not rely merely on allegations or denials in its own pleading." Fed. R.
14 Civ. P. 56(e). Rather, the non-moving party must set forth "specific facts" demonstrating the
15 existence of a genuine issue for trial. *Id.*; *Anderson*, 477 U.S. at 256. A party cannot create
16 a genuine issue for trial by asserting "some metaphysical doubt" as to the material facts,
17 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and merely
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21 ¹ In this case, plaintiff's counsel appears to have made a consistent practice of untimely responses. In their
22 motion for partial summary judgment, defendants request that the Court deem certain matters admitted due to
23 plaintiff's failure to provide answers to requests for admissions within thirty days after service. *See* Motion at
24 4 (docket no. 19); *see also* Fed. R. Civ. P. 36(a)(3) ("A matter is admitted unless, within 30 days after being
25 served, the party to whom the request is directed serves on the requesting party a written answer or objection
26 . . ."). In response, plaintiff alludes to "a clerical error," and states that the requests for admissions have now
been denied, presumably meaning that answers were served sometime after defendants filed their motion for
partial summary judgment. Response at 12 (docket no. 27). The Court declines to address whether the matters
in question should be deemed admitted for purposes of the pending motion for partial summary judgment
because, even absent such construed admissions, plaintiff cannot prevail. The Court, however, directs plaintiff
to SHOW CAUSE by November 21, 2008, why the matters should not be deemed admitted for purposes of
future motions or trial.

1 discrediting the testimony proffered by the moving party will not usually constitute a
2 sufficient response to a motion for summary judgment, *Anderson*, 477 U.S. at 256-57.

3 To survive a motion for summary judgment, the adverse party must present
4 affirmative evidence, which “is to be believed” and from which all “justifiable inferences”
5 are to be favorably drawn. *Id.* at 255, 257. When the record, however, taken as a whole,
6 could not lead a rational trier of fact to find for the non-moving party, summary judgment is
7 warranted. *See Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006); *see*
8 *also Beard v. Banks*, 548 U.S. 521, 529 (2006) (“Rule 56(c) ‘mandates the entry of summary
9 judgment, after adequate time for discovery and upon motion, against a party who fails to
10 make a showing sufficient to establish the existence of an element essential to that party’s
11 case, and on which that party will bear the burden of proof at trial.’” (quoting *Celotex*, 477
12 U.S. at 322)).

13 **C. State Law Claims**

14 Defendants contend that plaintiff’s claims for false arrest, false imprisonment, battery,
15 and assault are barred by the applicable statutes of limitations, which is two years with
16 respect to each cause of action. *See* RCW 4.16.100; *Heckart v. City of Yakima*, 42 Wn. App.
17 38, 708 P.2d 407 (1985) (false arrest). Plaintiff responds that he has not pleaded state law
18 claims. Response at 7 (docket no. 27). Although the body of plaintiff’s complaint does not
19 contain specific and/or separate counts under state law, such claims are described in the
20 caption of the complaint. Thus, to clarify matters, the Court grants defendants’ motion for
21 partial summary judgment and dismisses the claims of false arrest, false imprisonment,
22 battery, and assault because they are time-barred. Moreover, in light of plaintiff’s
23 representation that he is not pursuing any causes of action under state law, the Court sua
24 sponte dismisses plaintiff’s allegations of malicious prosecution, intentional infliction of
25 emotional distress, and negligence. Thus, all state law claims are dismissed, and plaintiff
26 shall be limited to the federal causes of action pleaded in his complaint.

1 **D. Qualified Immunity**

2 To withstand the individual defendants' claim of qualified immunity in this case,
3 plaintiff (i) must allege violation of a constitutional right that was "clearly established" at the
4 time of his arrest, and (ii) must raise a triable issue concerning whether the individual
5 defendants could have reasonably believed, perhaps mistakenly, that their respective actions
6 did not abridge a "clearly established" constitutional right. *See Hydrick v. Hunter*, 500 F.3d
7 978, 988-89, 1000-01 (9th Cir. 2007). The parties devote no attention to the question
8 whether the constitutional rights at issue were "clearly established," instead focusing on
9 whether the individual defendants' conduct was reasonable in light of the circumstances.
10 Plaintiff's underlying theory is that the permit for the A.N.S.W.E.R. march did not expire
11 until 5:00 p.m. on September 24, 2005, and that, by ordering plaintiff out of the street before
12 then, Officer Zurcher and Lieutenant Lowe improperly revoked the permit and violated
13 plaintiff's constitutional rights. Plaintiff's argument lacks merit. Although the Special Event
14 Permit authorized use of Westlake Park from 9:00 a.m. until 5:00 p.m., it did not extend to
15 the use of city streets or any areas outside of Westlake Park. Thus, the 5:00 p.m. deadline
16 has no relevance in this case.

17 In contrast, the applicable Parade Permit contained no time period of effectiveness; it
18 stated only the assembly or formation time and the starting time of the march. These times,
19 as well as the route of the march, were subject to modification by the Chief of Police "in the
20 interest of vehicular or pedestrian traffic safety." SMC 11.25.020. Such permits are
21 generally not granted for groups of less than 75 people, who can use the sidewalks and
22 "avoid the costs and dangers associated with marching in the street." City of Seattle Special
23 Events Handbook at 45, Exh. 1 to Carr Decl. (docket no. 20). Nothing in the Parade Permit
24 or the Seattle Municipal Code supports plaintiff's contention that, despite the completion of
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1 the march, Fourth Avenue had to remain closed to vehicle traffic until 5:00 p.m. or for the
2 additional period of time plaintiff chose to remain in the street.²

3 In comparison, defendants contend that Officer Zurcher and Lieutenant Lowe acted
4 reasonably, given the situation and their knowledge about the Parade Permit. To be entitled
5 to qualified immunity, the individual defendants do not have to prove that probable cause to
6 arrest plaintiff existed; they merely have to show that they reasonably believed their
7 “conduct was lawful, in light of clearly established law and the information [they] possessed
8 at the time.” *Fuller v. Jewelry*, 950 F.2d 1437, 1443 (9th Cir. 1991). “[E]ven if the officers
9 were mistaken that probable cause to arrest [plaintiff] existed, they are nonetheless immune
10 from liability if their mistake was reasonable.” *Id.* Here, Officer Zurcher, at Lieutenant
11 Lowe’s command, arrested plaintiff for pedestrian interference, a misdemeanor, which is
12 defined in relevant part as intentionally walking or standing in a public place “in such a
13 manner as to block passage by another person or a vehicle.” SMC 12A.12.015(A)(4), (B)(1),
14 & (C); *see* Exh. 1 to Hernan Decl. (docket no. 21). Based on the undisputed facts, Officer
15 Zurcher had probable cause, or at least a reasonable belief of probable cause, to arrest
16 plaintiff.

17 Plaintiff asserts that his actions were explicitly exempted from the pedestrian
18 interference provision, which indicates that “[a]cts authorized as an exercise of one’s
19 constitutional right to picket or to legally protest, and acts authorized by a permit issued
20 pursuant to the Street Use Ordinance, Chapters 15.02 through 15.50 of the Seattle Municipal
21 Code, shall not constitute obstruction of pedestrian or vehicular traffic.”

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23 ² Plaintiff alleges that representatives of A.N.S.W.E.R. had negotiated an agreement whereby SPD would
24 “maintain an open lane of traffic” on Fourth Avenue if the people involved in the event could not fit into
25 Westlake Park. *See* Rainey Decl. at ¶ 16 (docket nos. 27-5 & 27-8); *see also* Cutter Decl. at ¶ 6 (docket
26 nos. 27-4 & 27-9) (“My recollection is that the police agreed to open a lane of traffic on 4th avenue [sic] in the
event that the park space became overcrowded.”). Assuming such agreement existed, plaintiff has provided no
proof that Westlake Park was overcrowded at the time of his arrest, and no evidence that Officer Zurcher or
Lieutenant Lowe were aware of such agreement or of any need to keep Fourth Avenue closed or partially
closed to vehicle traffic.

1 SMC 12A.12.015(A)(4). Plaintiff's conduct, however, was not taken pursuant to a Street
2 Use Permit, and his defiance of repeated requests to move to the sidewalk could be viewed
3 by a reasonable officer as unrelated to the exercise of any constitutional right. Thus, even if
4 Officer Zurcher and/or Lieutenant Lowe were mistaken about whether the picket or protest
5 exception applied to plaintiff, no triable issue exists concerning whether their decision to
6 arrest plaintiff was reasonable given the situation.

7 With respect to plaintiff's allegation of excessive force, defendants seek to dismiss the
8 claim because no force, other than placing plaintiff in handcuffs, was used during the course
9 of plaintiff's arrest. In response, plaintiff does not dispute defendants' version of the facts,
10 but argues that the arrest alone, which plaintiff alleges was "false," constituted excessive
11 force. *See* Response at 17-18 (docket no. 27). Because the arrest was premised on probable
12 cause or at least a reasonably mistaken belief of probable cause, it was not "false" or
13 otherwise constitutionally defective, and therefore does not itself support a contention of
14 excessive force.

15 With regard to Detective Hernan, plaintiff appears to concede that she is entitled to
16 qualified immunity. Plaintiff, however, complains that defendants are "trying to have it both
17 ways" by relying on Detective Hernan's statements concerning what occurred at the scene
18 and by having an "officer who was never at the scene write reports that are then used as
19 evidence." Response at 18 (docket no. 27). Plaintiff ignores well-established law
20 concerning the "collective knowledge" doctrine, also known as the "fellow officer" rule,
21 which requires courts to consider, for purposes of evaluating the constitutionality of a stop,
22 search, or arrest, "the collective knowledge of all of the officers involved in the criminal
23 investigation although all of the information known to the law enforcement officers involved
24 in the investigation is not communicated to the officer who actually' undertakes the
25 challenged action." *United States v. Ramirez*, 473 F.3d 1026, 1032 & n.6 (9th Cir. 2007)
26 (quoting *United States v. Sutton*, 794 F.2d 1415, 1426 (9th Cir. 1986)). Here, Detective

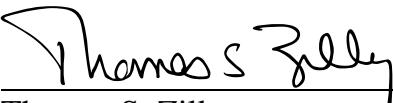
1 Hernan simply completed an Incident Report, appended to which was a copy of the Booking
2 Data Card prepared by Officer Zurcher, upon which she reasonably and permissibly relied.
3 See Exh. 1 to Hernan Decl. (docket no. 21). Her declaration contains no facts concerning
4 what occurred at the scene, but rather expressly states that she was “not out on the street”
5 and “did not witness Mr. Schmidt’s arrest.” Hernan Decl. at ¶ 5. Thus, defendants have
6 made consistent representations to the Court, and Detective Hernan is entitled to qualified
7 immunity.

8 **Conclusion**

9 For the foregoing reasons, the Court GRANTS defendants’ motion for partial
10 summary judgment and DISMISSES plaintiff’s state law claims, as well as all claims against
11 individual defendants Lieutenant Lowe, Detective Hernan, and Officer Zurcher on the
12 ground of qualified immunity. The Court DENIES plaintiff’s cross-motion for partial
13 summary judgment, and DENIES defendants’ motion to strike plaintiff’s cross-motion and
14 untimely response. The Court, however, directs plaintiff to SHOW CAUSE why the matters
15 in defendants’ requests for admissions should not be deemed admitted and why the
16 remaining claims in this case should not be dismissed. Plaintiff’s response to this Order to
17 show cause is due by November 21, 2008.

18 IT IS SO ORDERED.

19 DATED this 30th day of October, 2008.

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22 Thomas S. Zilly
23 United States District Judge
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